

HUMAN SERVICES DEPARTMENT[441]

Adopted and Filed

Pursuant to the authority of Iowa Code section 249A.4, the Department of Human Services amends Chapter 79, “Other Policies Relating to Providers of Medical and Remedial Care,” Iowa Administrative Code.

The landscape of Medicaid fraud, waste and abuse has changed and continues to evolve. A number of statutes and rules have changed rapidly in recent years at both the federal and state levels. The Department needs to clarify and make more explicit current policy. These amendments are in keeping with the 2010 United States Patient Protection and Affordable Care Act.

Notice of Intended Action was published in the Iowa Administrative Bulletin as **ARC 1621C** on September 3, 2014.

The Department received comments from two respondents during the comment period. The comments and the Department’s responses are as follows:

Comment 1: This comment was received from two respondents. With regard to the proposed revision of subrule 79.2(8), the respondents recommended clarification of the phrase “within a reasonable time frame.” The respondents stated that the withholding or suspension of payment is such a significant issue, that it is only fair that the person be notified as soon as possible. The respondents further recommended that notification be provided prior to any withholding or suspension of payment.

Response 1: Federal law requires that a state Medicaid agency send notice of suspension of program payments within five days of a payment suspension for a credible allegation of fraud (CAF) (42 CFR §455.23(b)(1)(i)). The Department will continue to comply with this federal requirement. In practice, the Department regularly mails the notice of payment suspension on the same day that the suspension is imposed. However, federal law contemplates that a five-day delay may be appropriate in some cases. Mailing the notice of payment suspension prior to the actual imposition of the payment suspension may impact the Department’s ability to protect Medicaid funds against fraud, waste or abuse if the provider receives advance notice of the payment suspension prior to implementation of the suspension. In cases not related to a CAF, the Department will send the notice of payment suspension within ten days of the payment suspension and has revised subrule 79.2(8) to read as follows:

“**79.2(8) Suspension or withholding of payments.** The department may withhold payments on pending and subsequently received claims in an amount reasonably calculated to approximate the amounts in question due to a sanction, incorrect payment, civil monetary penalty, or other adverse action and may also suspend payment or participation pending a final determination. If the department withholds or suspends payments, it shall notify the person in writing within the time frames prescribed by federal law for cases related to a credible allegation of fraud, and within ten days for all other cases.”

Comment 2: With regard to the proposed revision to paragraph 79.14(3)“d,” the respondent expressed concern that providers with a minor drug offense may be disenrolled from the Medicaid program.

Response 2: At the outset, the Department would note that a stricter version of this provision is presently found in subparagraph 79.2(3)“c”(2) and paragraph 79.2(3)“d”; the amendments in Item 3 and Item 8 move the provision from paragraph 79.2(3)“d” to paragraph 79.14(3)“d” and thereby change both the nature of the exclusion and its scope. With respect to the nature of the exclusion, presently such persons and their affiliated corporations are subject to mandatory termination (permanent exclusion), which under federal law also requires exclusion from Medicare and all other state Medicaid programs. Because the provision has been moved to paragraph 79.14(3)“d,” the exclusion is now a disenrollment, which lacks these federal collateral consequences. With respect to scope, disenrollment is now limited to persons owning, controlling, or directing 5 percent or more of a corporation and to controlled substance offenses incurred within the last five years.

In addition, the intent of the amendments is to provide the Department with the ability to protect Iowa's most frail members from an agency owned by someone whose recent activity places the member at risk of medication theft or financial abuse.

The Council on Human Services adopted these amendments on October 8, 2014.

These amendments do not provide for waivers in specified situations because requests for the waiver of any rule may be submitted under the Department's general rule on exceptions at 441—1.8(17A,217).

After analysis and review of this rule making, no impact on jobs has been found.

These amendments are intended to implement Iowa Code section 249A.4.

These amendments will become effective January 1, 2015.

The following amendments are adopted.

ITEM 1. Amend subrule **79.2(1)**, definitions of "Suspension of payments" and "Withholding of payments," as follows:

"*Suspension of payments*" means the temporary cessation of payments due a person until the resolution of ~~the a~~ matter in dispute between ~~the a~~ person and the department.

"*Withholding of payments*" means a reduction or adjustment of the amounts paid to a person on pending and subsequently submitted bills for purposes of offsetting ~~overpayments previously~~ payments made to, received by, or in the possession of a person.

ITEM 2. Amend subrule 79.2(2) as follows:

79.2(2) Grounds for sanctions. The department may impose sanctions against any person when appropriate. Appropriate grounds for the department to impose sanctions include, but are not limited to, the following:

a. to k. No change.

l. Breaching any settlement or similar agreement with the department, or failing to abide by the terms of any agreement with any other entity relating to, or arising out of, the state medical assistance program.

m. to v. No change.

w. Billing for services provided by an excluded, nonenrolled, ~~sanctioned~~ terminated, suspended, or otherwise ineligible provider or person.

x. and y. No change.

ITEM 3. Amend subrule 79.2(3) as follows:

79.2(3) Sanctions.

a. No change.

b. The withholding of ~~payments a payment~~ or a recoupment of medical assistance funds is not, in itself, a sanction. ~~Overpayments, civil monetary penalties, and interest charged~~ may also be withheld from future payments to the provider without imposing imposition of a sanction.

c. Mandatory suspensions and terminations.

(1) No change.

(2) ~~Termination is mandatory when a person pleads guilty or nolo contendere to, or is convicted of, any crime punishable by a term of imprisonment greater than five years, any crime of violence, any controlled substance offense, or any crime involving an allegation of dishonesty.~~ Termination is also mandatory upon entry of final judgment, in the Iowa district court or a federal district court of the United States, of liability of the person in a false claims action.

(3) No change.

(4) Upon notification from the U.S. Department of Justice, the Iowa department of justice, the department of inspections and appeals, or a similar agency, that a person has failed to respond to a civil investigative demand or other subpoena in a timely manner as set forth in governing law and the demand or other subpoena itself, the department shall immediately suspend the person from participation and suspend all payments to the person. The suspension and payment suspension shall end upon notification that the person has responded to the demand in full.

~~d.—Notwithstanding any previous successful enrollment in the medical assistance program, the person's passing of any background check by the department or any other entity, or similar prior approval~~

for participation as a provider in the medical assistance program, in whole or in part, termination from the medical assistance program is mandatory when, in the case of a natural person, the person has within the last five years been listed on any dependent adult abuse registry, child abuse registry, or sex offender registry or, in the case of a corporation or similar entity, 5 percent or more of the corporation or similar entity is owned by a person who has within the last five years been listed on any dependent adult abuse registry, child abuse registry, or sex offender registry.

ITEM 4. Amend subrule 79.2(4) as follows:

79.2(4) Imposition and extent of sanction.

~~a.~~ The department shall consider the totality of the circumstances in determining the sanctions to be imposed. The factors the department may consider include, but are not limited to:

- (1) a. Seriousness of the offense.
- (2) b. Extent of violations.
- (3) c. History of prior violations.
- (4) d. Prior imposition of sanctions.
- (5) e. Prior provision of provider education (technical assistance).
- (6) f. Provider willingness to obey program rules.
- (7) g. Whether a lesser sanction will be sufficient to remedy the problem.
- (8) h. Actions taken or recommended by peer review groups or licensing boards.

~~b.~~ A ground for sanction may precede enrollment in the medical assistance program, the person's passing of a background check, or similar prior approval for participation as a provider in the medical assistance program. The mere fact of an enrollment, a person's passing of a background check, or another approval is not relevant to the sanction decision.

~~c.~~ Upon certification from the U.S. Department of Justice or the Iowa department of justice that a provider has failed to respond to a civil investigative demand in a timely manner as set forth in Iowa Code chapter 685 and the demand itself, the department shall immediately suspend the provider from participation and suspend all payments to the provider. The suspension and payment suspension shall end upon certification that the provider has responded to the demand in full.

ITEM 5. Amend paragraph **79.2(7)“a”** as follows:

a. Any order of sanction shall be in writing and include the name of the person subject to sanction, identify the ground for the sanction and its effective date, and be sent to the person's last-known address. If the department sanctions a provider, the order of sanction shall also include the national provider identification number of the provider and be sent to the provider's last address on file within the medical assistance program. Proof of mailing to such address shall be conclusive evidence of proper service of the sanction upon the provider. The department of inspections and appeals is not required to comply with the additional notification provisions of 441—paragraph 7.10(7)“c” for appeals certified for hearing under this chapter.

ITEM 6. Amend subrule 79.2(8) as follows:

~~**79.2(8) Suspension or withholding of payments pending a final determination.** Where the department has notified a provider of any sanction, overpayment, civil monetary penalty, or other adverse action, the~~ The department may withhold payments on pending and subsequently received claims in an amount reasonably calculated to approximate the amounts in question or due to a sanction, incorrect payment, civil monetary penalty, or other adverse action and may also suspend payment or participation pending a final determination. Where If the department intends to withhold or suspend withholds or suspends payments, it shall notify the provider person in writing within the time frames prescribed by federal law for cases related to a credible allegation of fraud, and within ten days for all other cases.

ITEM 7. Amend subparagraph **79.3(2)“c”(3)** as follows:

(3) Service documentation. The record for each service provided shall include information necessary to substantiate that the service was provided and shall include the following:

1. and 2. No change.

3. The complete time of the service, including the beginning and ending time if the service is billed on a time-related basis. For those non-time-related services billed using Current Procedural Terminology (CPT) codes, the total time of the service shall be recorded, rather than the beginning and ending time.

4. to 9. No change.

ITEM 8. Amend subrule 79.14(3) as follows:

79.14(3) Program integrity information requirements.

a. No change.

b. The Iowa Medicaid enterprise may deny enrollment to a provider applicant or disenroll a current provider that has any affiliation as set forth in this rule if the department determines that the affiliation poses a risk of fraud, waste, or abuse. Such denial or disenrollment is appealable under 441—Chapter 7 but, notwithstanding any provision to the contrary in that chapter, the provider shall bear the burden to prove by clear and convincing evidence that the affiliation does not pose any risk of fraud, waste, or abuse. The Iowa Medicaid enterprise shall deny enrollment to or shall immediately disenroll any person that the Iowa Medicaid enterprise, Medicare, or any other state Medicaid program has ever terminated under rule 441—79.2(249A) or a similar provision and shall deny enrollment to any person presently suspended from participation, or who would be subject to a suspension, under paragraph 79.2(3) “c.” Further, a person sanctioned under rule 441—79.2(249A) or a similar provision may not manage consumer choices option (CCO) funds for a member.

c. For purposes of this rule, the term “direct or indirect affiliation” includes but is not limited to relationships between individuals, business entities, or a combination of the two. The term includes but is not limited to direct or indirect business relationships that involve:

- (1) A compensation arrangement;
- (2) An ownership arrangement;
- (3) Managerial authority over any member of the affiliation;
- (4) The ability of one member of the affiliation to control or influence any other; or
- (5) The ability of a third party to control or influence any member of the affiliation.

d. Notwithstanding any previous successful enrollment in the medical assistance program, the passing of any background check by the department or any other entity, or similar prior approval for participation as a provider in the medical assistance program, in whole or in part, disenrollment from the medical assistance program is mandatory when, in the case of a corporation or similar entity, 5 percent or more of the corporation or similar entity is owned, controlled, or directed by a person who (1) has within the last five years been listed on any dependent adult abuse registry, child abuse registry, or sex offender registry; (2) has pled guilty or nolo contendere to, or was convicted of, any crime punishable by a term of imprisonment greater than five years; (3) has, within the last five years, pled guilty or nolo contendere to, or was convicted of, any controlled substance offense; (4) has, within the last ten years, pled guilty or nolo contendere to, or was convicted of, any crime involving an allegation of dishonesty punishable by a term of imprisonment greater than one year but not more than five years; or (5) within the last ten years, has on more than one occasion pled guilty or nolo contendere to, or was convicted of, any crime involving an allegation of dishonesty.

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